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October 20, 2011

Via E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: *Canexus Chemicals Canada L.P. v. BNSF Railway Company*, STB Docket No. FD 35524 and NOR 42131

Dear Ms. Brown: 231143 231145

Accompanying this letter for e-filing in the referenced dockets is complainant Canexus Chemicals Canada L.P.'s Reply to Petition of BNSF Railway Company to Vacate the Emergency Service Order and Establish an Expedited Schedule to Address Complainant's Common Carrier Claims.

Please do not hesitate to contact the undersigned if you have any questions.

Regards,

Thomas W. Wilcox
Attorney for Canexus Chemicals Canada L.P.

cc: Counsel for BNSF Railway
Counsel for Union Pacific Railroad Company
Counsel for CP Railway

BEFORE THE
SURFACE TRANSPORTATION BOARD

CANEXUS CHEMICALS CANADA L.P. **Complainant,** **v.** **BNSF RAILWAY COMPANY** **Defendant**	**Docket No. FD-35524** **Docket No. NOR 42131**

REPLY TO PETITION OF BNSF RAILWAY TO VACATE THE EMERGENCY SERVICE ORDER AND ESTABLISH A PROCEDURAL SCHEDULE TO ADDRESS COMPLAINANT'S COMMON CARRIER CLAIMS

Complainant Canexus Chemicals Canada L.P. ("Canexus") hereby submits this Reply to the petition of BNSF Railway Company to vacate the emergency service order established in this proceeding by the Board's October 14, 2011 decision (Service Order Decision). For the reasons set forth below, the Board's decision was proper under the applicable law and the record before it. It is BNSF, not Canexus or the Union Pacific Railroad Company ("UP"), who has put the Board in the position of taking the appropriate and commendable action set forth in the Service Order Decision. BNSF, whose unilateral business decision to short haul itself for chlorine rail movements starting in 2011 in violation of its common carrier obligation is the reason the parties are before

the Board, continues to try and justify its actions with gross distortions of the underlying facts and misstatements of law.

As a preliminary issue, BNSF, in its misguided zeal to attempt to portray Canexus as an obstructionist in this proceeding, violated the Board's rules governing mediation by revealing details of that unsuccessful process in this proceeding. To support its theme that Canexus has created its own service emergency by being picky about a supposed plethora of rail rate offers placed before it, BNSF states that "while the substance is confidential, Canexus has also rejected the commercial terms offered to it for continued rail service offered to it for continued rail service to Kansas City by BNSF during STB-sponsored mediation." Petition at 2. This statement, and the purpose for which it is made, is a clear breach of the Board's rules governing the strict confidentiality of mediation proceedings. 49 C.F.R. § 1109.3, which governs all mediation proceedings conducted under the Board's auspices, provides:

> In all ADR involving the Board,...the confidentiality provisions of that Act (5 U.S.C. 574) shall bind the Board *and all parties* and neutrals in those ADR matters. (emphasis supplied.)

And, 5 U.S.C. § 574(b) makes it clear that a "party to a dispute resolution proceeding shall not disclose . . . *any* dispute resolution communication." (emphasis supplied.) Despite this clear prohibition, BNSF has seen fit to spread on the public record Canexus' response to a proposal made during the mediation and attempt to use that response to support BNSF's substantive position. This is both unfortunate and inappropriate.

As the Board will recall, it was BNSF that requested mediation in the first instance.[1] Canexus initially objected to that request, primarily because of its expressed concern that the matters would involve discussions of a confidential contract it had entered into with the UP to which BNSF was not a party.[2] Notwithstanding the reservations of Canexus, the Board ordered mediation and specifically directed the mediator to take steps to protect the confidentiality of those contract terms.[3] BNSF has breached the confidentiality terms of the mediation by disclosing communications that took place during that session in an attempt to paint Canexus (incorrectly) as unreasonable and obstructionist. Those communications are not admissible in this matter. 5 U.S.C. §574(c).

BNSF's actions here threaten to discredit the ADA process established by the Board. Why should any complainant agree to participate in Board-supervised mediation requested by a railroad in the future if the railroad may offer a proposal no rational shipper would accept and then try to use the complainant's decision to not accept the proposal to the railroad's advantage later in the formal part of the proceeding? Consequently, the Board should summarily strike this passage from BNSF's Petition

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[1] BNSF Request to Refer the Parties Interchange Dispute to Board Supervised Mediation, filed June 15, 2011.

[2] *See* letter from Thomas W. Wilcox to Cynthia T. Brown, dated June 20, 2011. Although not expressed in its letter to the Board at that time, Canexus was also concerned that BNSF would use the mediation to gain some tactical advantage in the expected event that the mediation failed to resolve the problem caused by the carrier's decision not to comply with its common carrier obligation to provide rates and service to Kansas City for the traffic in question. As it turns out, by misusing the mediation process, BNSF has now done exactly what concerned Canexus.

[3] STB FD Docket 35524, Decision served June 21, 2011 at 2.

from the record in this proceeding both because its inclusion breaches the rules relating to ADR efforts and acts as a disincentive to participation in future mediations.

A. BNSF's Claims that Canexus has Multiple Alternatives to BNSF are False

BNSF's petition continues to try and make the facts of this case much more complicated than they actually are. As explained in Canexus' other filings in this case, for years its chlorine has moved to UP-served destinations in the Western United States via joint line moves with BNSF and UP. These movements have been pursuant to common carrier rates established by BNSF to BNSF/UP interchange points, and from those interchange points to the final customer via rail transportation contracts between UP and Canexus. Canexus has a contract with UP for the transportation of its chlorine from the BNSF/UP Kansas City interchange to customers in Texas, Illinois and Arkansas. It is undisputed that BNSF and UP have an established, efficient interchange in Kansas City. Indeed, the very movement that Canexus sought to establish in its May 25 Request for an Order Compelling the Establishment of Common Carrier Rates has been in place since April of this year and 90 carloads of chlorine have been efficiently and safely transported under the BNSF common carrier rates and UP contract since that time. Nevertheless, because of its business decision to short haul itself on certain chlorine movements starting in 2011 BNSF first refused to provide the common carrier rates to Kansas City and is now vigorously resisting keeping in place the "temporary" common carrier rates it established which led to the filing of Canexus' formal Request.

There is no viable or effective potential alternative to BNSF for transportation of chlorine from North Vancouver and Marshall to the Kansas City Interchange. Prior to CP Railway's ("CP") intervention in this proceeding Canexus had demonstrated that CP,

which has never transported Canexus' chlorine from North Vancouver to Kansas City, is not a viable alternative to BNSF. The routing is 500 miles longer, more circuitous and less efficient, all of which factors BNSF simply ignores.[4] Similarly, even if it was relevant here (which is not the case), the potential "rate that CP might charge"[5] was not commercially viable. Hence, BNSF is simply incorrect when it continually asserts that either its proposal at mediation or the "offer" from CP were "commercial terms."

But BNSF's claims regarding the alleged CP alternative are moot. On October 5, 2011, CP informed the Board that it had made no formal rate proposal to Canexus, and that it had not established a rate or terms for this transportation. On October 18, 2011, CP informed Canexus via email that its "informal quote expired as of October 13, 2011 (30 days as of the offer)," and that "CP does not plan to re-quote on this route." Finally, CP's October 19, 2011 reply to BNSF's Petition has erased any remaining shred of doubt that CP is not an alternative to BNSF for transporting Canexus' chlorine to the Kansas City interchange with UP.

CP has confirmed what the Board correctly pointed out in its Service Order Decision: Canexus has no actual rail alternative to BNSF for transportation from North Vancouver to Kansas City for interchange with UP and furtherance on to Canexus customers. Consequently, if BNSF does not continue to provide this service to Kansas

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[4] In its Petition BNSF attempts to further complicate the facts by mentioning Canadian National Railway as a potential alternative. But CN does not have any interchange with UP at Kansas City.

[5] Letter to Board from Terrence Hynes on behalf of CP Railway, dated October 5, 2011 at 1.

City, the Canexus contract with UP is effectively nullified and Canexus will be unable to fulfill its obligations to its customers in Texas, Illinois, and Arkansas.

BNSF's arguments that Canexus has alternatives to BNSF can be broken down into one basic premise: as long as BNSF can identify any potential alternative to it providing common carrier rail service to an established interchange point BNSF deems too far away – no matter how costly or circuitous the potential alternative is (or even unsafe, since BNSF does not even concede this point) – BNSF can be relieved of its common carrier obligation to provide service to that interchange point, even if the shipper and the connecting railroad have entered into a rail transportation contract.[6] BNSF's position is unsupported, unsupportable, and directly contrary to the recognized and necessary national policy, highlighted by the Board in the Service Order Decision, that chlorine and other TIH commodity shipments are vital to the Nation's economy and the Nation's railroads have an obligation to transport them. As such, the Board must prevent BNSF from abdicating its common carrier responsibilities for its own private interests.

Moreover, CP's participation in this proceeding has affirmed that the BNSF segment of the joint route is a "bottleneck" segment, since Canexus has no other alternative to BNSF for transportation from North Vancouver and Marshall, Washington to the Kansas City interchange. Canexus has explained in its other filings in this case that the law is clear that BNSF must continue to provide service over its bottleneck segment of the entire route due to the undisputed fact that the interchange is feasible and efficient, and the presence of the contract between UP and Canexus. *Central Power & Light Co. v.*

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[6] Taken to its next logical step, BNSF's position would permit it to abdicate its common carrier responsibilities if there was *any* potential alternative to it for transporting the commodity by any other mode, no matter how far fetched or infeasible.

Southern Pacific, et al., 2 S.T.B. 235, 244 (1997).[7] Indeed, under these circumstances the existence of the rail transportation contract between UP and Canexus should be the conclusive factor in determining that BNSF must continue to provide common carrier rates and service to the Kansas City interchange. *See* STB Finance Docket No. 33467, *FMC Wyoming Corp and FMC Corp. v. Union Pacific RR Co.* (served December 12, 1997), at 4 ("once a shipper has a contract rate for transportation to or from an established interchange, the bottleneck carrier must provide a rate that permits the shipper to utilize its contract with the non-bottleneck carrier.") (emphasis added).

Finally, BNSF contends, remarkably, that it was somehow "irresponsible" for Canexus to sell its products to markets served by UP. Petition at 15. BNSF, which was created by merging a number of railroads with the promise of providing long haul, efficient and competitive rail service, thus contends that it also became the arbiter of which markets a shipper should be able to serve and now should be able to short haul traffic it deems undesirable. Notwithstanding what BNSF might prefer, it is a common carrier, has no legitimate role in determining its customers' markets, and is obligated to provide service over its system on reasonable demand.

B. The Board's Application of Section 11123 Was Proper Under the Circumstances of this Proceeding

BNSF's contention that the Board misapplied section 11123 is simply wrong and contrary to the plain and unambiguous statutory language. The Board's reliance on this provision was fully justified by the facts before it, authorized by the plain language of the

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[7] BNSF's petition includes a rehash of the arguments BNSF has previously made about the Board's jurisdiction over cross-border movements. Canexus has addressed this issue in its other filings in the case and intends to do so again it its submittals pursuant to the Board's Service Order Decision.

statute, and was well within the Board's broad authority to apply its specialized expertise to resolve a specific dispute. This provision clearly states that, except for disputes between railroads over the terms of compensation not applicable here, "the Board may act under this section on its own initiative or on application without regard to subchapter II of chapter 5 of title 5." 49 U.S.C. 11123(b)(1)(emphasis supplied). Thus, not only was the Board fully within its authority to act on its own motion, the statute plainly states that the Board need not comply with the notice and hearing requirements of the Administrative Procedure Act. Accordingly, BNSF's extended arguments that the Board somehow misapplied this clearly worded statute are perplexing, to say the least.[8]

BNSF further complains that the Board has previously acted with "great restraint" when exercising this authority (Petition at 6) and that it should accordingly not set some sort of contrary precedent by granting relief to Canexus. However, BNSF cites no case in support of this forbearance that is in any way similar to the controversy it has created. BNSF clearly provides rail service, even chlorine transportation, over this routing in the normal course of business, but has inexplicably decided - and threatened through several deadlines - to cease doing so for Canexus and for BNSF's interchange partner UP.

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[8] Moreover, the Board clearly has both the general authority, under 49 U.S.C. § 721(a), and the ancillary authority, to take broad action to carry out its responsibilities to ensure that common carriers continue to provide service over their lines. The courts have long recognized that an agency may exercise ancillary authority when necessary to accomplish its statutory responsibilities. *See, e.g., ICC v. Am. Trucking Ass'ns,* 467 U.S. 354, 365-71 (1984); *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 636-38 (1978); *United States v. Chesapeake & Ohio Ry.*, 426 U.S. 500, 510 (1976); *Comcast Corp. v. FCC*, 600 F. 3d 642, 651-60 (D.C.Cir. 2010). Here, the Board's exercise of its authority is necessary to ensure that BNSF's gaming tactics do not wreak further harm on this shipper's ability to market its product.

Notwithstanding BNSF's protests, section 11123 was literally drafted to give the Board authority to quickly remedy the "unauthorized cessation of operations" of a common carrier that has a "substantial adverse effect" on a shipper. Once such a finding is made, the statute plainly gives the Board authority to "direct the handling, routing, and movement of the traffic of a rail carrier . . . over its own or other railroad lines." 49 U.S.C. 11123(a). That BNSF has selectively targeted Canexus or its chlorine traffic does not moot the essential principle that the Board has the authority to require a railroad to provide service over its own line if the criteria of the statute are met for an individual shipper.

BNSF curiously cites *Granite State Concrete Co. & Milford-Bennington R.R. Co., Inc. v. Boston and Maine Corp & Springfield Terminal Ry. Co.. STB Docket No. 42083 (STB served Sept. 15, 2003)* for the proposition that the Board may not properly issue emergency service orders in situations where "rail service is in fact available." (Petition, at 7.) In the first, place CP has confirmed that no alternative to BNSF is available to the Kansas City interchange. But in any event, that case is clearly not helpful to BNSF's position since the issue was whether the shipper could compel the serving railroad to make its tracks available to another carrier so that the latter could provide three switches per day as opposed to the two it was currently receiving. Here, BNSF believes it has the right to refuse any service at all.

Similarly, BNSF's reliance on *Expedited Relief for Service Inadequacies, 3 S.T.B. 968 (1998)* is misplaced and takes the quoted sentence out of context. The issue before the Board that was discussed at the cited pages related to whether the Board's proposed rules pertaining to the provision of "alternative rail service" covered situations where the

shipper had access to competing rail service. But here, no alternative to BNSF, let alone a competitive alternative, exists in this record, and so the Board is not ordering "alternative" rail service, but only that BNSF continue to provide the service required of a common carrier along its own line.[9]

Another red herring BNSF serves is its contention that the emergency service order issued here "cannot be used to address a shipper's concerns over rate levels." The several cases cited by BNSF are of course completely inapposite, as this particular matter has nothing to do with the level of the rates BNSF has established, but BNSF's desire to not have any rates in effect in the first instance. The Service Order Decision of which BNSF complains now was a response to that railroad's combination of refusing to provide service coupled with its tactics of waiting until the last moment to "voluntarily" extend its service along the route for some arbitrary period, which it refused to extend further, thus forcing the Board to act. There may well be a time and place to determine whether the rates BNSF has charged are unreasonable, but this is not that time.

Moreover, the Board's invocation of section 11123 in this dispute is salutary and justified for another very important reason: it removes control of this proceeding from BNSF, which has used the spectre of terminating its rates to Kansas City as a means to

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[9] For its part, UP's Reply to the BNSF Petition initially suggests that CP provides an alternative routing. As noted above, that suggestion would be incorrect even if CP was in fact willing to provide a rate, which of course is not the case. And, UP's citation of *Albemarle Corp. - Alternative Rail Service - Line of the Lousiana & North West R.R.*, STB Finance Docket No. 34931 (STB served Oct. 6. 2006), and *Keokuk Jct. Ry. - Alternative Rail Service - Line of Toldeo, Peioria & Western Ry.*, STB Finance Docket No. 34397 (STB served Oct. 31, 2003) as a purported basis for withholding the use of the section 11123(b) remedy is just as defective as are the arguments of BNSF on this issue. Both of those cases involved rate disputes between the shipper and the carrier. Here, BNSF is unwilling to provide service at *any* rate.

control the pace and the content of the record for decision. One of the more remarkable self-serving assertions in its Petition is the notion that BNSF is somehow "being penalized for acting responsibly while this dispute has been pending" Petition, at 13. The record belies that assertion and is graphic evidence of why the Board's action was both appropriate and necessary.

This controversy began when BNSF established "temporary rates" for this service on April 8, 2011, but only until June 30, 2011 for the stated purpose of giving Canexus time to rework its contractual agreement with UP. This action prompted Canexus to file its Request on May 25, 2011, and the Board to hurriedly schedule oral argument on the skimpy record at that time in order to be able to act by BNSF's imposed arbitrary deadline. Although Canexus was prepared to go forward with oral argument BNSF requested mediation and unilaterally extended its rate, but only until July 31, 2011, thus creating another deadline for Canexus, UP, and the Board. Due in large part to BNSF, the actual mediation session was delayed until August 24. In the interim, BNSF made additional short extensions, but had set September 30 as the new deadline for the rates to terminate, which put undue pressure on the mediators and the parties and affected the discussion. When mediation was unsuccessful and Canexus asked to restart the proceeding on September 14, BNSF unilaterally extended the rates again, but only to October 15. BNSF did not further extend the rates, thus forcing the Board to act by October 14 to preserve service. Having received decision adverse to it on October 14, BNSF now says it "would again be willing to provide service to the Kansas City interchange," but BNSF now wants to bargain with the STB and condition its extension on STB's agreement with BNSF's terms to (1) vacate the emergency service order and

(2) commit to "hear and fully resolve the underlying legal claims raised by Canexus by a date certain, which BNSF believes should be within 60-90 days."

The Board's use of its authority under section 11123 was not only entirely justified by the plain language of the statute and the record of this proceeding, it will permit the STB, not BNSF, to control the agenda and content of the record for decision. Completely aside from this abuse of the Board's processes, BNSF's conduct has interfered with Canexus' legitimate business interests. Clearly, the uncertainty of the rate and route expiring or not makes it very difficult for Canexus to plan and operate its business. Consequently, the Board's exercise of its authority under section 11123 in these circumstances enables the service to continue in a safe and efficient manner and Canexus to intelligently market and ship its product while the dispute is resolved under the control of the Board.

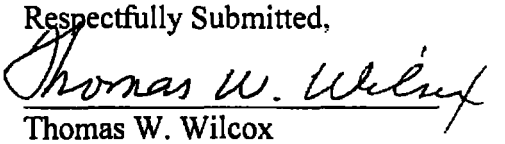
In any event, the Board's expedited procedural schedule would appear to lead to a decision on the merits well within the 90-day window BNSF deems to be acceptable. Regardless, there is no need for the STB to negotiate with BNSF over how the STB should manage its docket.

C. Conclusion

The Board's invocation of section 11123 to resolve the specific issues before it and ensure that the transportation at issue continues pending a final resolution of the legal issues presented by Canexus' complaint was appropriate and well within the authority granted to the Board by that statutory provision. Canexus is completely agreeable to proceeding as the Board has determined in the Service Order Decision. BNSF's objections to the Board's Service Order Decision are unfounded and should be rejected,

as should also BNSF's continued attempts to muddy the waters of this fairly straightforward dispute. BNSF clearly has the legal obligation to provide common carrier rates and service to Canexus for the transportation of chlorine from Canexus' North Vancouver facility and from Marshall, Washington, to the Kansas City interchange to be transported to UP-served destinations pursuant to the rail transportation contract between Canexus and UP. Its threat to cancel those rates and routes justifies the Board's decision to compel their continuation.

Respectfully Submitted,



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October 20, 2011

CERTIFICATE OF SERVICE

I do hereby certify on this 20th day of October, 2011 that I have delivered a true and correct copy of the foregoing *Reply to Petition of BNSF Railway to Vacate the Emergency Service Order and Establish a Procedural Schedule to Address Complainant's Common Carrier Claims* to the following addressees at the addresses stated via email and regular mail:

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